



Kariuki v Kanithi & 2 others (Environment & Land Case 865 & 342 of 2017 (Consolidated)) [2024] KEELC 13722 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13722 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 865 & 342 OF 2017 (CONSOLIDATED)**

**JG KEMEI, J
DECEMBER 5, 2024**

BETWEEN

STANLEY KIBE KARIUKI PLAINTIFF

AND

JANE KIARIE KANITHI 1ST DEFENDANT

KEZIAH WANJIKU 2ND DEFENDANT

CHIEF LAND REGISTRAR, KIAMBU 3RD DEFENDANT

JUDGMENT

1. Vide a Complaint dated 13/9/2017, the Plaintiff claims that he is the bona fide registered owner of land parcel known as Karai/gikambura/612 (hereinafter the “suit land”) measuring approximately 1.5 acres. That he acquired the suit land for valuable consideration through a sale agreement in the year 2015 between him and the previous registered owner namely Keziah Wanjiku (Keziah).
2. That the Plaintiff upon conducting due diligence paid Keziah the entire purchase price and Land Control Board consent was obtained. Subsequently the parties signed the requisite transfer documents and the Plaintiff was issued with a title deed. That Keziah’s ownership since 1986 had never been challenged and while transacting, Keziah informed the Plaintiff that the Defendant herein was in illegal occupation of the suit land and attempts to evict him had been hindered by suits filed by the Defendant and her late husband.
3. The particulars of Defendant’s illegal occupation of the suit land are enumerated at para 8 of the Complaint. The Plaintiff pleaded that the Defendant’s continued illegal occupation of the suit land has deprived him of his exclusive rights of use and enjoyment of the suit land.
4. The Plaintiff prayed for Judgment in terms That;



- a. A declaration that the Plaintiff is the lawful registered owner of the parcel of land known as Karai/gikambura/612 (suit land)
 - b. A permanent injunction to restrain the Defendant by herself her employees servants agents representatives or in any manner howsoever from entering trespassing selling charging disposing transferring building constructing any structure remaining on or carrying on any activity of whatever nature on the suit land.
 - c. A mandatory injunction to issue against the Defendant ordering her , her employees servants agents representatives to vacate and handover possession to the Plaintiff or her employees servants agents representatives.
 - d. An order directing the Officer Commanding Kikuyu Police Station to supervise the enforcement of the orders herein by providing security to the Plaintiff his family members his representatives agents and or workers servants to enforce the said order.
 - e. General damages for trespass and unlawful occupation.
 - f. Costs of the suit
5. The 1st Defendant filed her Statement of Defence and Counterclaim dated the 8/3/2018 and 16/3/2017 respectively.
 6. Save for the descriptive parts, she denied the Plaintiff's claim in toto and put him to strict proof. She contended that the Plaintiff's certificate of title was obtained by fraud and any transfer of the suit land from Keziah to the Plaintiff was illegal because there were encumbrances lodged over the title. That in particular there was a caution registered on 22/4/1987 by her late husband Moses Mburu Njoroge (Moses); and a restriction on the basis of the Kiambu's CID letter dated 18/8/2003 and another restriction pursuant to Land Appeal Case No. Kiambu West 10 of 2009.
 7. The 1st Defendant maintained that she owns the suit land as a dependant of the Estate of Njoroge Kaguma Murega (Moses' father) and also as an administrator of the Estate of her deceased husband. She pointed out that there is another suit between the parties and Keziah and the Chief Land Registrar namely Case No. 342 of 2017. She urged the Court to dismiss the Plaintiff's suit with costs.
 8. In her Counterclaim, the 1st Defendant sought the following orders against the Plaintiff , the 2nd and 3rd Defendants;
 - a. An injunction.
 - b. A declaration that the suit land belongs to the 1st Defendant and the Plaintiff has no legal right to interfere with her lawful use and occupation.
 - c. Damages and interest thereon.
 - d. Costs of the suit.
 9. It was her case that at all material times to the suit, she was the occupier and proprietor of the suit land by virtue of her marriage with Moses Mburu, her deceased husband.
 10. In rebuttal the Plaintiff filed a Reply to the Defence dated 5/6/18.
 11. On 26/9/2023 the instant suit and Thika ELC 342 of 2017 were consolidated with lead file being Thika ELC 865/2017 and the matter was set down for hearing.



12. The Plaintiff Stanley Kibe took the witness stand as PW1. It was his testimony that he purchased the suit land from Keziah. That he was shown the beacons and conducted a search at the Land's Office and subsequently obtained Land Control Board consent.
13. He accuses the Defendants of fraudulent collusion and transfer of the suit land to the 1st Defendant leading to issuance of her Certificate of Lease on 23/2/2010. That the 1st Defendant has entered into an Agreement for Sale with the 2nd Defendant and executed a transfer which is pending registration. Further that the 2nd Defendant has entered the suit land and damaged it by digging up trenches for a perimeter wall hence the suit. He adopted his statement dated 13/12/2017 and produced the documents in his List of Documents as PEx. No. 1 - 11.
14. In cross, PW1 said he bought the suit land in January 2016 and relied on his sale agreement dated 24/8/2011 between him and Keziah. That he obtained Land Control Board consent dated 3/12/2015. He confirmed that he's been charged in Kikuyu for forging documents in respect of the suit land and assaulting the 1st Defendant. Further that there were encumbrances on the suit land in 2011 but he nevertheless purchased it because it was registered in Keziah's name. He also admitted that the 1st Defendant was his neighbour and was aware of her occupation on the suit land. Shown page 30 of his trial bundle, PW1 confirmed that the transfer document was not signed.
15. On further cross-exam by the 3rd Defendant, PW1 agreed that he was issued with a title deed on 25/1/2016 upon lodging the transfer documents with the 3rd Defendant's office.
16. In re-exam PW1 clarified that he submitted the original transfer documents on whose strength his Title Deed was issued. That in respect to the criminal charges he faces, the assault case was dismissed.
17. The Plaintiff's second witness was Daniel Njenga Njuge, a retired Chief of Karai location where the suit land is situate. He adopted his witness statement dated 17/1/2022 as evidence in chief. His evidence was that he knew Keziah and her family as residents of Gikambura. That in 1984 he accompanied Keziah and her brother – Charles Karuga to view the suit land, Keziah having shown interest to buy it from Daniel Njoroge Kaguma (Njoroge). That Njoroge with intent to relocate to Gilgil was well known to PW2 and he showed them the beacons and actual size of the suit land. During the said visit Njoroge was in the company of his wife who did not object to the proposed sale. Further that the purchase price was agreed at Kshs. 84,000/- which was paid via Kenya Commercial Bank Ltd.
18. In cross PW2 stated that he served as a Senior Assistant Chief from 1987-2000 and that the land dispute was referred to the District Officer (D.O), District Commissioner (D.C) and Provincial Commissioner (P.C) then. He denied any knowledge of an order by the P.C directing a refund to Keziah. He added that he knew the 1st Defendant after the suit had been sold. The witness also explained that Njoroge sold the suit land to Keziah so as to purchase another parcel of land in Gilgil.
19. The third witness was Elizabeth Muthoni Njoroge, Njoroge's wife. She adopted her statement dated 17/1/22 as evidence in chief. She informed the Court that she lived on the suit land with Njoroge Murega aka Kaguma who sold the suit land to Keziah.
20. In cross, PW3 confirmed knowing the Plaintiff. That she was the second wife of Njoroge who was also married to Margaret Njoki, (first wife). That the said Margaret lived in Loitoktok and was married to Njoroge but later separated though they together sired Moses and his brother, Karanja.
21. On further cross-exam PW3 said when Njoroge died, no succession proceedings were filed but maintained that the suit land having been sold to Keziah there was no necessity to petition for succession and in any event the suit land could not form part of the estate of Njoroge.



22. In re-exam, PW3 elaborated that the proceeds of the suit land were utilized to pay for the Gilgil land measuring about 7 acres. That the latter was divided as follows; Moses – 3 acres, Karanja – 2 acres; and PW3 – 2.5 acres and that Moses' share of the land is still in Gilgil.
23. That was the end of the Plaintiff's case.
24. The 1st Defendant Jane Kanithi testified as DW1. She relied on her undated statement as her evidence in chief. She also produced documents in her trial bundle marked as Dex. 1 – 20.
25. In cross, DW1 said she is the widow of the late Moses. That Moses, the son of Njoroge had lodged a caution over the suit land. That Njoroge was the original owner of the suit land and he sold it to Keziah. On being shown the green card, DW1 conceded that Keziah was registered as the owner of the suit land on 31/10/86. That Njoroge died in the year 2000 and that she had no document to show that Moses was given the land by his father, Njoroge, in his lifetime. She concluded her testimony by saying that she was not aware of any succession proceedings in respect of Njoroge's estate.
26. In cross, DW1 was emphatic that she was married to Moses in 1986 and they lived on the suit land. That she was aware her father in law – Kaguma moved to Gilgil but Moses remained on the suit land. She denied PW3's marriage to Njoroge and maintained that her mother in law was Eunice Njoki. The witness further explained that Moses died in 2010 while Kaguma died in 2000 and that he (Kaguma) never filed any suit claiming ownership of the suit land.
27. On being asked the outcome of the Land Dispute Tribunal case between Moses and Keziah, DW1 denied knowing its outcome. Upon being shown the Tribunal's Ruling at page 23-25 of the Plaintiff's trial bundle, DW1 recalled the outcome but said they did not comply with it and instead opted to appeal. The witness was further shown the green card and she confirmed that the suit land was transferred to Keziah in 1986 and that later through forged documents, it was transferred to the Plaintiff. DW1 admitted that she did not have any evidence to prove that Keziah procured forged documents in respect of the suit land as stated in her witness statement.
28. With that, the defence case was closed.
29. The 2nd Defendant was said to have passed away on the 11/2/2021. For the record the 2nd Defendant was never substituted and therefore her the Plaintiff's case abated as at 10/2/2022.
30. The 3rd Defendant did not call any witness.
31. Parties elected to file their written submissions which I have read and considered.

Written submissions

32. The Plaintiff through the firm of F.N Njanja & Co. Advocates filed submissions dated 24/5/2024. Narrating the background of the suit, four issues were drawn for determination; whether there was a valid transfer of land between Kaguma and Keziah; whether the Plaintiff obtained a good title from Keziah; whether the 1st Defendant has a cause of action regarding the suit property and who should bear costs.
33. On the first issue reference was made to the Land Dispute Tribunal and Provincial Appeal Tribunal proceedings and outcomes which proved that Keziah paid Kshs. 84,000/- as purchase price for the suit land. That Keziah duly transferred the suit land to the Plaintiff in her lifetime and the Plaintiff obtained a title deed thereof. Section 26(1) of the [Land Registration Act](#) was cited to demonstrate that Keziah was the absolute and indefeasible owner of the suit land and absent any evidence to the contrary the Court was urged to find that there was a valid transfer of title from Keziah to the Plaintiff.



34. The 1st Defendant submitted and assaulted the title held by the Plaintiff on the grounds that it was procured through forgery. Further she submitted that the question of locus of the 1st Defendant was a smoke screen by the Plaintiff to deny her the suit land in which her husband Moses held a beneficial interest and urged the Court to dismiss the Plaintiffs suit and allow her counterclaim.
35. The 3rd Defendant submitted that without any evidence to the contrary the transfer between the Plaintiff and Keziah was valid. That according to the record the District Land Dispute Tribunal held that Moses was a trespasser on the suit land and ordered his eviction. The Provincial Land Dispute Tribunal arrived at the same verdict and in addition ordered the removal of the caution lodged by Moses on the title. That there was no evidence led by the 1st Defendant that the decision of the Provincial Land Dispute Tribunal was ever appealed.
36. As to whether the Plaintiff obtained a good title from Keziah, the 3rd Defendant submitted in the positive based on the sale agreement dated the 31/10/1986 between Njoroge and Keziah. Keziah sold the land to the Plaintiff in 2016. That being the case the only person who can file a complaint is the estate of Keziah or Njoroge none of which the 1st Defendant was able to prove in evidence. That the allegations of forgery were not proven save for particularizing the same. That indeed the 1st Defendant admitted in evidence that she adduced no such evidence to enable the Court to determine the culpability of the Plaintiff as far as fraud was concerned.
37. In closing the 3rd Defendant expressed its doubt as to whether the 1st Defendant had any cause of action against the Plaintiff. It submitted in the negative.

Analysis & Determination

38. The issues that commend themselves for determination in my view are;
 - a. Who is the owner of the suit land?
 - b. Who bears costs?
39. It is trite that he who alleges must prove. See Sections 107 - 108 of the [Evidence Act](#) Cap 80 provide that;
 - “ 107. Burden of proof
 1. Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 108. Incidence of burden
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
40. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.
41. Undoubtedly, it emerges that there has been protracted litigation touching on the suit land herein. This is evidenced by the PEX. 1 and 2 and in particular the order of 13/3/2009 that affirmed Keziah’s



ownership over the suit land having purchased it from Njoroge Kaguma Murega. Moses Mburu Njoroge the Defendant's husband and Kaguma's son was held to be a trespasser on the suit land and was ordered to vacate within 60 days. Dissatisfied with that Order, Moses Mburu appealed to the Provincial Land Appeals Tribunal and vide the Ruling of 20/5/2009 the Appeals Tribunal arrived at a similar finding as the Land Disputes Tribunal that is to say Moses Mburu was held to be illegally occupying Keziah's land. Moses was ordered to vacate the suit land with immediate effect and relocate to Gilgil and the cautions imposed on the suit land by Moses ordered to be removed. These findings fortify the Plaintiff's claim that Keziah was the owner of the suit land having bought it from the previous owner Njoroge Kaguma and she was so registered on 31/10/1986. Her title deed was adduced as Pex. 5. PW2 and PW3 also testified to her ownership. PW2 in particular was crucial having witnessed the sale between the Keziah and Njoroge who are now both deceased.

42. Accordingly, from the foregoing, there is credence to the Plaintiff's claim of purchase of the suit land from Keziah leading to the registration into his name. Transfer forms and a title deed (Pex. 9) issued on 25/1/2016 were produced in evidence. Copy of the green card as well was produced detailing the history of the suit land ownership was produced as Pexh.... Tracing the original owner of the suit land as Njoroge Kaguma Pex 10.
43. Indeed, by her admission, the Defendant testified that she had knowledge of the Appeals Tribunal orders but said they never complied but they preferred to appeal. No evidence of such appeal was adduced in Court or its outcome if at all. The orders of the Tribunals are thus in force and valid. DW1 further conceded that there was no complaint over the suit land by her late father in law who died in 2000. Additionally, she did not have any evidence to show that her late husband was given the suit land by his father.
44. Section 26 of the *Land Registration Act* provides;
 - “26. Certificate of title to be held as conclusive evidence of proprietorship
 1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
45. Section 25 of the *Land Registration Act* fortifies the rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided for in the Act.
46. Last but not least Article 40 of *the Constitution* of Kenya confers protection to the right to own property to the extent provided therein.
47. In the Court of Appeal case of Munyu Maina Vs. Hiram Gathiha Maina Nyeri Civil Appeal No. 239 of 2009 [2013] eKLR the Learned Judges stated that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument



- and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.
48. Similar sentiments were echoed by the Court of Appeal in the case of *Bandi Vs. Dzomo & 76 Others* [2022] KECA 584 (KLR) in affirming the trial Court Judgment that dismissed the Appellant's suit for want of proof observed that a party had the burden of proof and the incidence to prove that indeed he had a good title to the suit property beyond dangling the instruments of title as proof of ownership.
 49. The Court has found that the allegations of forgery were not proven. The 1st Defendant admitted in evidence that she had not adduced any evidence in Court. She further stated that there is a criminal case against the Plaintiff for a charge of forgery but the 1st Defendant failed to adduce evidence in the criminal case or the investigation report to aid the Court. In any event this Court does not have the jurisdiction to determine criminal cases and since no determination has been reached as to the guilt or otherwise of the Plaintiff a conclusion cannot be reached on the validity of the said orders by this Court.
 50. Applying the standard of proof placed on the Plaintiff to prove his case and the forgoing Court of Appeal precedents, I reach the inevitable conclusion that the Plaintiff has proved his case on a balance of probabilities.
 51. The Plaintiff prayed for general damages for trespass and unlawful occupation against the Defendant. Going by the Provincial Appeals Tribunal Ruling of 20/5/2009.
 52. Section 3 (1) of the *Trespass Act*, Cap 294 stipulates provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
 53. The Court of Appeal decision in the case of *Kenya Power & Lightig Company Limited Vs. Fleetwood Enterprises Limited* [2007] eKLR affirmed inter alia that where trespass is proven the affected party need not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the Court is bound to assess and award damages on a case to case basis. Additionally, the case of *Duncan Nderitu Ndegwa Vs. KP& LC Limited & Another* (2013) eKLR for the holding, inter alia, that once a trespass to land is established it is actionable per se and indeed no proof of damage is necessary for the Court to award damages.
 54. I am of the view that the 1st Defendant and her late husband remained in unlawful and illegal occupation of the suit land from the year 2009 but as against the late Keziah who was the owner of the suit land then. The Plaintiff was registered as the owner of the suit land on 25/1/2016 and the Defendant continued with her illegal occupation. I have sighted P.Exh. 10 the Summons dated 22/8/2017 by the Assistant County Commissioner to the Defendant. It would appear that the parties failed to reach an agreement leading to the filing of this case. At the time of hearing the Defendant confirmed that she was still residing on the suit land. I am of the view that the 1st Defendant has trespassed against the Plaintiff's land for a period of 8 years now. An award of Kshs. 350,000/- in my view suffices as general damages for trespass.
 55. In conclusion the Court found that the suit land belonged to Njoroge having been registered as such in 1959 whereupon he was issued with a title in 1975; he sold the land to Keziah in 1986 and utilized the proceeds to purchase 7 acres in Gilgil; he obtained Land Control Board consent for the transfer which was carried out in the presence of his wife, PW3; he relocated his family to Gilgil where the 1st Defendant's husband was allocated 3 acres by his father ; it is said that the 1st Defendant and her



husband refused to relocate to the land; it is therefore not true that the 1st Defendant will be left as a destitute; Moses lost two suits in the District Land Dispute Tribunal and the Provincial Land Dispute Tribunal which panels held that the land belonged to Keziah and that the 1st Defendant was a trespasser and ordered him to be evicted from the suit land and the caution removed; clearly Moses never complied with the orders; Keziah sold the land to the Plaintiff in 2016 and no evidence was adduced to challenge the process and or the title of the Plaintiff; the 1st Defendant is a trespasser on the suit land and for that reason the Court is satisfied that the Plaintiff is entitled to general damages for trespass.

56. In the end and based on the totality of the evidence and material before Court, I am satisfied that the Plaintiff's claim has merit.
57. The 1st Defendant's counterclaim fails for want of proof and further as against the late Keziah, the suit stood abated as at 12/7/2022 having died on 11/7/2021 and there being no evidence of her substitution.
58. Final Orders for disposal;
 - a. The 1st Defendant's Counterclaim fails for lack of proof. It is dismissed.
 - b. The Plaintiff's case against the 2nd Defendant abated on 10/7/2022.
 - c. A declaration be and is hereby made that the Plaintiff is the lawful registered owner of parcel of land known as Karai/gikambura/612 (suit land).
 - d. The 1st Defendant be and is hereby ordered to voluntarily vacate the suit land within a period of ninety (90) days from the date of Judgement in default eviction shall ensue.
 - e. An order directing the Officer Commanding Kikuyu Police Station to supervise the enforcement of the orders herein by providing security to the Plaintiff his family members his representatives agents and or workers servants to enforce the said order.
 - f. A permanent injunction be and is hereby issued restraining the 1st Defendant by herself, her employees, servants, agents, representatives or in any manner howsoever from entering, trespassing, selling, charging, disposing, transferring, building, constructing any structure remaining on or carrying on any activity of whatever nature on the suit land.
 - g. General damages for trespass and unlawful occupation in the sum of Kshs 350,000/- in favour of the Plaintiff payable by the 1st Defendant.
 - h. Costs of the suit shall be in favour of the Plaintiff.
67. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

F. N. Njanja for the Plaintiff

Mugu for 1st Defendant

2nd Defendant – Absent



Ms. Ndundu for the 3rd Defendant
Court Assistants – Ann/Melita

